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80-917

No. .....

In the Supreme Court of the United States

October Term, 1980

CHARLES BENSON, JR., AND CHARLES FREDERICK "FRED" TAYLOR,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
PETITION FOR CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON BEHALF OF CHARLES BENSON, JR., AND CHARLES FREDERICK "FRED" TAYLOR

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether petitioners' Fifth Amendment right to proceed to verdict before the jury which had been empaneled and which had heard 36 government witnesses testify during 11 days of trial was violated by the *sua sponte* declaration of mistrial by the District Judge over petitioners' objection where there were less drastic alternatives available?

II.

Whether the United States Court of Appeals for the Sixth Circuit erred in failing to require the exploration of less drastic alternatives than mistrial where the mistrial was declared *sua sponte* by the District Judge over the objection of the petitioners?

III.

Whether a *sua sponte* declaration of mistrial, without an exploration of less drastic alternatives and over the objection of petitioners, is in conflict with a prior decision of the United States Court of Appeals for the Sixth Circuit, as well as with decisions of the First, Second, Third, Fourth, Fifth and Ninth Circuits?

PARTIES

The parties to the proceedings in the United States Court of Appeals for the Sixth Circuit were Thomas Edward Sisk, Charles Benson, Jr., Charles Frederick "Fred" Taylor and William Aubrey Thompson, Appellants. This petition for certiorari is filed on behalf of Benson and Taylor. The United States of America was the Appellee and is now the Respondent.

JUDGMENTS BELOW

The judgment of the Court of Appeals (App. 23-34) is not yet reported. The denial of the petition to rehear is not yet reported. (App. 35). The opinion of the District Court is not reported. (App. 1-22).

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JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was dated on September 18, 1980, the petition to rehear was denied by order dated October 7, 1980 and the judgment was entered on October 10, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment V, Constitution of the United States.

STATEMENT OF THE CASE*

This is a RICO prosecution[1] wherein Thomas Edward Sisk (legal counsel to the Governor of Tennessee), and the Petitioners, Charles Benson, Jr. (extradition officer to the Governor) and Charles Frederick "Fred" Taylor (a highway patrolman assigned to the Governor's Security Staff) were jointly charged with others[2] with a scheme to use

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*References to the joint appendix filed with the Court of Appeals will be as (167A), references to the trial record by (Tr. 167) and references to the Appendix by (App. 167).

1. 18 U.S.C. 1962(c) (1976).

2. The original indictment charged Thomas Edward Sisk, legal counsel to the Governor of Tennessee, Charles Benson, Jr., extradition officer to the Governor, Fred Taylor, a highway patrolman assigned to the Governor's Security Staff, William Aubrey Thompson, a political figure in Chattanooga, Tennessee, together with Dale M. Quillen, a Nashville attorney and J. P.

(Continued on following page)

their political influence to sell pardons, paroles and commutations and to block extraditions, all essential functions of the office of the Governor.

Following hearings on pre-trial motions, jury selection commenced in the case on July 16, 1979 and following the selection of 12 regular and six alternate jurors, proof began before Judge Charles G. Neese,[3] on July 19, 1979. The trial continued until August 3, 1979 when it was interrupted by a heart attack suffered by Judge Neese during the weekend recess following adjournment of Court on Friday, August 3, 1979. The case was placed in a recess status until August 10, 1979 when Judge Neese certified that he would be unable to continue with the trial.[4] Circuit Judge Gilbert S. Merritt was designated to replace Judge Neese but the proceedings remained in recess until August 30, 1979. Eleven trial days, which included the testimony of 36 Government witnesses, covering some two thousand pages of transcript preceded Judge Neese's illness.

On August 30, 1979, Judge Merritt scheduled a hearing to determine whether it was proper to resume the trial

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Footnote continued—
Murrell. Murrell was not tried with these defendants and Quillen was severed by Judge Merritt following Judge Neese's illness. Thompson was a party through the denial of the petition to rehear with the United States Court of Appeals for the Sixth Circuit, but has stated that he will not present a Petition for Certiorari. Sisk will present his own separate Petition for Certiorari. This petition is presented only on behalf of Benson and Taylor.

3. Sitting by designation.

4. Rule 25, Federal Rules of Criminal Procedure which provides that if by reason of death, sickness or other disability, the Judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the Court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

before the same jury and he conducted an extensive voir dire examination of the jurors individually for the stated purpose whether the interruption had so dimmed the memory of any juror so as to make the resumption of the trial impractical or whether any juror had been exposed to information outside the courtroom to an extent which might influence their "reaction to the evidence." (166A-170A).

On August 6, 1979, the Monday following Judge Neese's heart attack on Friday afternoon, an article had appeared in the Nashville Tennessean which gave rise to the publicity issue.[5]

Of the eighteen jurors interviewed by Judge Merritt, only two, both of whom were regular jurors demonstrated any impairment of memory (187A, 194A) resulting from the delay. Six of the jurors, five from the regular panel

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5. The front page article recounted an alleged offer which had been made by some unknown person to the defendant, Sisk, in order to influence a member of the jury in exchange for the payment of $25,000.00. According to this article, and according to other exhibits filed, Sisk purportedly received a telephone call on the evening of July 20, 1979, directing him to return that call from a pay phone and directing that for the payment of $25,000.00, influence could be brought to bear upon a member of the jury. Sisk communicated this information to his attorney, Cecil Branstetter, who advised Sisk to meet him in his office the following Saturday morning. Following this conversation, for reasons known only to Sisk, he further communicated this information to John Seigenthaler, publisher for the Nashville Tennessean. Seigenthaler contacted William R. Willis, counsel for the newspaper, and following a conference with Branstetter, it was determined that the attempt must be reported to Judge Neese. This was done the following day and resulted in the commencement of a secret but fruitless investigation by the FBI. Nothing about the report of the alleged jury tampering attempt to Seigenthaler or the investigation it precipitated was made known to any of the other defendants or to their counsel. It was only some 2 weeks later that the situation was revealed to them during a chambers hearing conducted by Judge Neese. In publishing this article the newspaper made the less than prophetic observation that it was "clear there is no further reason to delay publication" (133A-151A, 320A-326A, 330A-333A).

and one alternate, demonstrated any knowledge of extra judicial events (174A, 178A, 188A, 208A, 218A, 233A), but of the six only two, Barrett and Adams, indicated any problem in continuing. (Ms. Barrett was one of the two jurors who expressed some dimming of memory). The Court excused juror Adams and indicated that he would, in all likelihood, excuse Ms. Barrett. (191A, 221A, App. 42-44). In addition thereto, the Court considered excusing a third juror, Ms. Baker.[6]

Upon completion of the *voir dire* examination, Judge Merritt noted that he would complete his reading of the trial transcript over the Labor Day weekend and the court and counsel engaged in a discussion of ground rules attendant to the anticipated resumption of the trial on Tuesday, September 4, 1979. (App. 44-48).[7] It was only on the morning of September 4, that Judge Merritt gave any indication that the declaration of a mistrial was necessary.[8] The "unexpected" problem was based upon an

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6. Ms. Baker had been interviewed by the FBI relative to a box that she had used to prop her feet on during the trial which the FBI had determined might contain a bomb. (183A-186A, App. 43-44).

7. "I plan on spending this Labor Day weekend reading the transcript. I have it all and it runs about two thousand pages, and I have read six or seven hundred pages, but I'll read the rest of it over the weekend, including that transcript, and we'll come back, and I think the best thing to do, if it appears that the case will go on to continue, we should ask the jury to come in about 10:30 so we can take up any matters at 9:00 Tuesday that remains, but I would contemplate that over the—well in all eventuality that we ask the jury to come in Tuesday morning at 10:30 and we reconvene at 9:00 Tuesday morning." (App. 47-48).

8. "The Court has read the transcript of the trial. I received, as I think I indicated to counsel, the last installment of the transcript in mid-week last week and I spent the weekend reading over the remaining portion of the transcript. There is, unexpectedly, at least one problem that I see we need to discuss this morning and we have xeroxed - and I'll ask the Clerk to give the Marshal - some copies of the portion of the transcript which concerns me. You just pass that out to each one of them, to counsel." (App. 6). (265A). *Cf.* (286A-288A) (App. 18-21).

instruction given by Judge Neese on August 2, 1979. On August 2, 1979, the tenth day of trial, the early edition of the evening newspaper printed a headline which restated a ruling made by the Court that morning relative to the admissibility of certain co-conspirator testimony. A hearing had been held and Judge Neese had ruled all out of the presence of the jury that the proof to that point was sufficient to demonstrate that a conspiracy existed as to 4 of the 5 defendants, thereby making admissible certain hearsay testimony (116A). The headline stated in essence "Neese Rules Four of Five Formed Conspiracy". Counsel for Sisk and Thompson were fearful that some of the jurors might have been exposed to the headline during the luncheon recess and based upon this possibility of jury prejudice, Sisk and Thompson moved for a mistrial. However, these petitioners did not, stating that they were not financially able to bear the expense of a second trial. (App. 39). Judge Neese, on his own motion without request from any party instructed the jury as to the reason for the headline-provoking ruling. (App. 37-42). All counsel excepted to this instruction but testimony continued to the end of that day and on through the following day, August 3, 1979. (App. 42). It was following adjournment of court on August 3, 1979, that Judge Neese suffered a heart attack.

Judge Merritt distributed to counsel the pages of the transcript containing the instruction and asked for comment from counsel. (App. 6, 41-42). Following a recess all counsel expressed their opinion that the instruction was error, but all objected to a termination of the proceedings, essentially on the same financial grounds presented by these petitioners to Judge Neese. Judge Merritt determined that the error in the instruction was of sufficient magnitude when considered in conjunction with the delay

and the prejudicial publicity to mandate a mistrial. (265A-299A) (App. 1-22).

A motion to dismiss was filed and overruled by Judge Merritt and notice of appeal was timely filed. The action of the trial judge was sustained by the Court of Appeals in an opinion dated September 18, 1980 (App. 23-34) and a petition to rehear was filed on September 26, 1980 and overruled on October 7, 1980. (App. 35).

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the instant case was presented to the trial court by Motion to Dismiss the indictment on the ground that the declaration of a mistrial *sua sponte* over the objection of the petitioners, was violative of their rights as guaranteed by the double jeopardy clause of the Fifth Amendment to the United States Constitution. The Motion to Dismiss was timely filed following the declaration of mistrial on September 4, 1979 by order entered October 12, 1979 (App. 1-22).

ARGUMENT

Manifest Necessity

In spite of the "valued right to have [their] trial completed by a particular tribunal"[9] a trial may nevertheless be interrupted under some circumstances by mistrial even over the objection of the defendant. The test for balancing the interests of the defendant and the interests of society is that of "manifest necessity" as set forth in Mr. Justice Story's opinion in *United States v. Perez*, 22 U.S. 256 (9 Wheat. 580) (1824):

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9. *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L. Ed. 974 (1949).

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. United States v. Perez, 9 Wheat. 579, 580, 6 L.Ed. 165.
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> *Arizona v. Washington*, 434 U.S. 479, 506 fn. 18, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

While the term "manifest necessity" appears in every case decided on this issue since 1824, its appropriate scope and application to particular factual situations has been a fertile source of litigation. The most recent discussion of the spectrum of situations created by the declaration of a mistrial is found in *Arizona v. Washington, supra,* wherein this Court faced a situation where a mistrial had been declared *sua sponte* over the objection of the defendant, but where the declaration was based upon improper comments made by defense counsel in his opening statement. The issue presented was the appropriate standard of review where the trial court determined that the comment, made in open court and in the presence of all the

jurors, raised the potential of juror bias. The Court in discussing the spectrum of mistrial situations found that the classic "hung jury" situation clearly mandating a mistrial lies at one extreme where actions by the judge or prosecutor clearly designed to harass the defendant into seeking the mistrial finds its place at the other. In the former situation "utmost deference" is given to the action of the trial judge whereas in the latter situation his actions are reviewed by a standard of "strictest scrutiny." As the Court of Appeals correctly determined in this case, as in *Arizona v. Washington, supra,* the issue of potential juror bias falls somewhere between the ends of the spectrum.[10]

> We are persuaded that, along the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny, the difficulty which led to the mistrial in this case also falls in an area where the trial judge's determination is entitled to special respect.
>
> *Arizona v. Washington, supra,* at p. 510.

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10. There are factors present in the case at bar that would indicate that it belongs further along the spectrum toward "strictest scrutiny" than the situation presented in *Arizona v. Washington, supra.* In that case the conduct that precipitated the mistrial was clearly the improper comment made by counsel for the defendant in the presence of the jury in open court. In contrast to the situation presented here where the precipitating event was the media publicity relating to the ruling of the trial judge which may or may not have been brought to the attention of the jurors. Furthermore, the juror bias created in *Arizona v. Washington* was clearly against the government as defense counsel had made a statement concerning improper action on the part of the government in a previous prosecution. Here, the potential jury bias was against only one of the defendants, the defendant Sisk, and did not relate to either of these petitioners. Where the mistrial is declared for the ostensible purpose of protecting the defendant, his position should be accorded greater weight than the situation presented in *Arizona v. Washington* where it was the government that found itself at a disadvantage. *See, Curry v. Superior Court,* 2 C.3d 707, 717, 87 Cal. Rptr. 361, 470 P.2d 345 (1970).

The "special respect" accorded the determination of the trial judge as to potential juror bias recognizes that under ordinary circumstances the trial judge is in the best position to determine whether or not there is a substantial likelihood of juror bias as a matter of fact.[11] But this factual decision is not determinative, it merely brings into play a second component part of the trial judge's responsibility. Therefore, in addition to determining *the fact* of potential jury bias the trial judge having answered this question in the affirmative must then exercise his sound - and reviewable - discretion that a "high degree of necessity" exists requiring the declaration of mistrial.

The Supreme Court explained the second step of analysis as follows:

> The trial judge, therefore, "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." United States v. Jorn, 400 U.S. at 486, 91 S.Ct. 547, 27 L.Ed.2d 543 (Harlan, J.). In order to ensure that this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised "sound discretion" in declaring a mistrial.
>
> *United States v. Grasso*, 600 F.2d 342, 344 fn. 6 (2nd Cir. 1980).

It is at this point, the review of "sound discretion", that the reasoning of the Court of Appeals becomes divergent with not only the reasoning in its own prior decision of *Thomas v. Beasley*, 491 F.2d 507 (6th Cir. 1974); but

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11. *Arizona v. Washington, supra*, pp. 513-514.

also, in direct conflict with the test applied in the post-*Arizona v. Washington* decisions in every circuit that has considered the question.

The First,[12] Second,[13] Third,[14] Fourth,[15] Fifth,[16] and Ninth[17] Circuits in determining the appropriate scope of review necessary to satisfy the second prong of the "manifest necessity" test have consistently equated "sound discretion" with exploration of less drastic alternatives than the termination of trial by mistrial. This is in direct conflict with the approach taken by the Sixth Circuit in the present case. Under the clear and unequivocal language of the cases in these other circuits, the appellate court in addition to according "special respect" to the factual determination by the trial judge that an event has occurred which might require the declaration of a mistrial, must also satisfy itself that the exercise of "sound discretion" included the consideration of available alternatives.

> In the absence of such a motion [motion for mistrial by the defendant], the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion

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12. *United States v. Pierce*, 593 F.2d 415 (1st Cir. 1979).

13. *Hogan v. Dunkerley*, 579 F.2d 141, 147 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1090, 99 S.Ct. 872, 59 L.Ed.2d 56 (1979).

14. *United States v. McKoy*, 591 F.2d 218, 222 (3rd Cir. 1979).

15. *Harris v. Young*, 607 F.2d 1081, 1085 (4th Cir. 1979).

16. *United States v. Starling*, 571 F.2d 934, 941 (5th Cir. 1978), *Cf. Cherry v. State Board of Corrections*, 613 F.2d 1262, 1267 fn. 17, 1268 fn. 19 (5th Cir. 1980), rehearing *en banc* granted 4/25/80.

17. *United States v. Sanders*, 591 F.2d 1293, 1297 (9th Cir. 1979), *United States v. Smith*, 621 F.2d 350, 351 (9th Cir. 1980).

> that the ends of public justice would not be served by a continuation of the proceedings.
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> *United States v. Jorn*, 400 U.S. 470, at p. 485, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

In *United States v. Pierce, supra,* under a factual situation very similar to the case at bar[18] the court required that sound discretion contain the exploration of alternatives to mistrial and held that retrial was barred reasoning that ". . . our first inquiry must be whether the court gave adequate consideration to the existence of any less drastic alternatives." *United States v. Pierce, supra,* at p. 417.

This equation has been consistently restated in substantially the same way:

> Under the Court's analysis in Jorn, supra, the government generally must demonstrate that, under the circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial. See also Arizona v. Washington, supra; and only by considering and exhausting all other possibilities can the judge ensure that the defendant has received the full protection of the Double Jeopardy Clause. In reviewing the decision of the trial court, our duty is to see that

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18. In *Pierce,* four jurors had been exposed to extra-judicial information concerning pre-trial motions from the husband of one of the jurors who had been in the courtroom during some of the hearing. This information created potential juror bias against the defendant as the gist of the conversations related to the fact that the defendant was trying to work something out or to have some evidence excluded.

> alternatives to declaring a mistrial were completely canvassed. (citations omitted).
>
> *United States v. McKoy, supra,* at p. 222.[19]

> In determining whether the trial judge exercised sound discretion in declaring a mistrial, we must consider if there were less drastic alternatives to ending the trial. If less drastic alternatives than a mistrial were available, they should have been employed in order to protect the defendant's interest in promptly ending the trial...
>
> *Harris v. Young, supra,* at p. 1085.[20]

> The failure to consider less severe alternatives to mistrial was determinative in Jorn, and has been assigned significance in our own decisions. (citation omitted).
>
> *United States v. Starling, supra,* at p. 941.[21]

In the present case it is beyond question that the trial judge did not consider less drastic but available alternatives to mistrial to correct the problem created by the event of the jury-tampering publicity. Judge Merritt placed primary emphasis on the purportedly erroneous instructions and having determined that no alternatives were available which would cure the prejudicial impact of

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19. The declaration of a mistrial *sua sponte* over the objection of the defendant on the ground that the trial court was concerned that defense counsel was a necessary witness to a pre-trial confrontation between the defendant and a prosecution witness was held to bar a retrial.

20. A mistrial declared over the objection of the defendant for the failure of the government to comply with a pre-trial order discovery overlooked less drastic alternatives and barred retrial.

21. The Court held that the fact that the defendant had exchanged remarks with one of the jurors did not necessitate a mistrial as other alternatives were available.

these instructions on the jury ended his inquiry. The correct[22] determination by the Court of Appeals that mistrial is an inappropriate device to cure judicial error of that type, went on to review an exercise of "sound discretion" that in fact never took place. Judge Merritt simply did not consider less drastic alternatives which were available to him save the day and neither did the Court of Appeals. The Court of Appeals substituted its judgment as to what Judge Merritt would have done had he known that he could not consider the erroneous instructions as a precipitating event, but in so doing it completely overlooked its obligation of appellate review.

The record clearly demonstrates that less drastic alternatives were available, albeit never considered.

The potential juror bias created by the deliberate actions of Sisk resulted in prejudice, if any, against Sisk and Sisk alone. The alleged jury-tampering scheme which had resulted in substantial media coverage during the interruption of the trial made no reference to Benson or Taylor and clearly resulted from no action on their part. They were merely the victims of a set of circumstances about which they had no knowledge and over which they had no control. An obvious alternative to a mistrial was available to them.[23] As in *Thomas v.*

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22. *United States v. Nickerson*, 606 F.2d 156 (6th Cir. 1979), *cert. denied*, 100 S.Ct. 528 (1979); *United States v. Vinson*, 606 F.2d 149 (6th Cir. 1979); See also, *United States v. Watkins*, 600 F.2d 201, 204 (9th Cir. 1979); *United States v. Eubanks*, 591 F.2d 513, 519 (9th Cir. 1979); *United States v. James*, 590 F.2d 575, 580 (5th Cir. 1979); *United States v. Santiago*, 582 F.2d 1128, 1136 (7th Cir. 1978); *E.g. United States v. Bell*, 573 F.2d 1040, 1044 (9th Cir. 1978).

23. The alternative of severance had already been utilized by Judge Merritt as to the original Defendant Dale M. Quillen. Judge Neese's ruling (152A-154A) that Quillen had not been shown to have been a member of "the" conspiracy involving

(Continued on following page)

Beasley, supra, the court could have severed Sisk and the trial could have proceeded as to appellants Benson and Taylor, before the same jury.[24] The simple act of removing the defendant against whom the potential of jury prejudice was directed would have protected the rights of these appellants to proceed to verdict before the jury.

In addition, the record presents another less disruptive and more obvious alternative. Judge Merritt *voir dired* the jury at length and with great care on August 30, 1979 on the issue of potential jury prejudice. Judge Merritt has previously determined that no more than three jurors were subject to exclusion (two because of contact with the jury-tampering publicity and one for an unrelated reason). This left a sufficient number of jurors to provide

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Footnote continued—
Sisk, Benson, Taylor and Thompson with the resulting instruction to the jury that the hearsay testimony of the alleged co-conspirator, Grantham, was not to be considered against Quillen formed the basis of Judge Merritt's determination that Quillen's motion for severance should be granted. (116A, App. 16).

The trial record demonstrates that Judge Merritt did not consider the alternative of severance of Sisk from Benson and Taylor.

> MR. BRANSTETTER: [Counsel for Sisk] . . . I don't know whether that a severance of some of the Defendants at this point in time, as we had moved previously, would be a solution. Some of the—for example, and I'm not speaking for anyone except Mr. Sisk in this matter at all. So far, Mr. Taylor's had no involvement in this trial.
>
> THE COURT: Well, the court has severed the only Defendant that Judge Neese found was not subject to the Enright Rule. (App. 16).

24. In *Thomas v. Beasley,* the declaration of a mistrial by a state trial judge as to three armed robbery defendants barred a retrial as to one of the three, where the precipitating event was the fact that the arrest warrant for the other two defendants had been signed by their trial counsel while serving as special judge. The Court of Appeals ruled that the District Judge was correct in determining that the state trial court judge should have considered the alternative of severance as to the defendant Beasley and that there was no manifest necessity not to try him before the jury that had been empaneled.

12 regular jurors, and at least 3 alternates, clearly a viable alternative. Of the 18 originally selected jurors none were lost during the 50 days between July 16, 1979 when the selection process began and September 4, 1979 when they were discharged. This 50 day period substantially exceeded the projections of time necessary to complete the trial.

The failure of the trial judge and the failure of the Court of Appeals to examine the obvious available alternatives to mistrial have clearly subjected these appellants to all the elements[25] to which the double jeopardy clause is designed to insure that no citizen can be subjected.

> We resolve any doubt "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion."
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> *Downum v. United States,* 372 U.S. 734, 738, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963).

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25. As Mr. Justice Black stated in *Green v. United States,* 335 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199: "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, *thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity,* as well as enhancing the possibility that even though innocent he may be found guilty." (Emphasis added.) *Arizona v. Washington, supra,* at p. 504, fn. 13.

CONCLUSION

The petitioners respectfully submit that on the basis of the foregoing, that a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted reversing its decision and ordering that the Motion to Dismiss be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 79-30054-NA-CR

UNITED STATES OF AMERICA

v.

THOMAS EDWARD SISK, CHARLES BENSON, JR., CHARLES FREDERICK "FRED" TAYLOR, WILLIAM AUBREY THOMPSON

OPINION AND ORDER ON DEFENDANTS' PLEAS OF DOUBLE JEOPARDY AND MOTION TO RECONSIDER "ENTERPRISE" QUESTION

(Filed October 12, 1979)

MERRITT, J. The Court declared a mistrial in this case over the defendants' objection. All of the defendants have filed pleas in bar for dismissal of the indictment on grounds that further prosecution and trial on the charges would "subject [them] for the same offense to be twice put in jeopardy of life or limb" in violation of the fifth amendment. The pleas are denied for the reasons hereafter stated.

The Court has already stated orally on the record in detail its reasons for ordering a mistrial. (A copy of the transcript of the Court's earlier statements is attached at the end of this opinion.) The action was based on the Court's findings after voir dire of the members of

the jury individually that the parties could not receive a fair trial before the existing jury (1) because of the one month intermission in the trial, during which there was extensive publicity concerning alleged efforts to bribe a member of this jury, allegations which some members of this jury saw or heard about, and (2) because the trial judge, in good faith but erroneously, told the jury in clear and unmistakable language that in his opinion the preponderance of the evidence so far introduced in the case demonstrated that the defendants were guilty of the conspiracy charged. Such an instruction constitutes serious error. See *United States v. Vinson and Thompson* (Nos. 78-5406 and 78-5412, 6th Cir. Sept. 27, 1979) and *United States v. Nickerson and Hall* (Nos. 78-5368 and 78-5392/3, 6th Cir. Sept. 28, 1979). Each defendant stated on the record that the second event constitutes reversible error, fatal to a fair trial, which could not be corrected or ameliorated by further voir dire or instructions to the jury. (See transcript of the hearing attached at the end of this opinion.)

Where a judge acting under Rule 25, Federal Rules of Criminal Procedure, finds under these circumstances that there is a *manifest necessity* for declaring a mistrial in a criminal case, a retrial of the defendants thereafter does not constitute a violation of the double jeopardy clause, as that clause has been uniformly interpreted by the Supreme Court since the early days of the republic. This court is not authorized, therefore, under the law to dismiss the case on double jeopardy grounds. See *United States v. Perez*, 22 U.S. 256 (9 Wheat. 579) (1824) (reprosecution not barred where "there is a manifest necessity" for mistrial); *Simmons v. United States*, 142 U.S. 148 (1891) (reprosecution not barred where jury discharged after forty hours of deliberation for inability to reach a verdict); *Thompson v. United States*, 155 U.S.

211 (1894) (reprosecution not barred where jury discharged because one juror had served on grand jury indicting defendant); *Wade v. Hunter,* 336 U.S. 684 (1949) (retrial not barred where military court-martial discharged due to tactical necessity in the field); *Gori v. United States,* 367 U.S. 364 (1961) (reprosecution not barred where trial judge discharged the jury because the prosecution asked improper questions concerning prior crimes); *United States v. Jorn,* 400 U.S. 470 (1971) (reprosecution barred where trial judge discharges the jury without a showing of manifest necessity and in clear abuse of his discretion); *Illinois v. Somerville,* 410 U.S. 458 (1973) (reprosecution not barred where, prior to taking of any evidence, mistrial granted due to presence of incurable defect in indictment); *United States v. Dinitz,* 424 U.S. 600 (1976) (reprosecution not precluded where mistrial ensued from good-faith expulsion by trial judge of defendant's counsel); *Arizona v. Washington,* 434 U.S. 497 (1978) (where record evinced manifest necessity for mistrial due to improper and prejudicial opening statement by defense counsel, reprosecution not prevented by failure of trial judge to make explicit manifest necessity finding). In all of these cases the Court held that retrial is not barred under the double jeopardy clause where a mistrial is ordered for reasons of manifest necessity, even though the defendant objected or did not consent to the mistrial.

II.

In light of the ably presented motion of the defendant Sisk for reconsideration of the Court's earlier enterprise ruling, the Court has reconsidered this question in its own mind. The Court agrees that the question is not free from doubt and that it would be helpful to have appellate review of this issue prior to trial. Assuming an appeal from the Court's ruling on the defendant pleas of double jeopardy,

an appeal to which the defendants appear to be entitled as a matter of right under *Abney v. United States*, 431 U.S. 651, 662 (1977), the appellate court will not be required also to address the enterprise issue. But in the interest of judicial economy, and the conservation of judicial, governmental and private resources, it may be possible for the appellate court to consider the issue.

Upon reconsideration of the issue, this Court is not persuaded that its construction of "enterprise" to include governmental agencies is in error. The Court agrees, for reasons stated in *United States v. Sutton* (No. 78-5134-5-6-7-8-9-41-2-3, 6th Cir. Sept. 4, 1979) that the RICO statute, as it finally emerged from Congress, is ambiguous in certain respects and, unless given a rational and fair construction, threatens to subsume many traditional state and federal criminal laws and preempt local administration and responsibility for criminal law enforcement. But this does not mean that the distinction between private and public agencies proposed by the defendants is a rational limiting principle. I simply cannot find this distinction anywhere in the language or history of the statute. As previously explained, the language of the statute—both the definition of "enterprise" contained in the statute and the inclusion of bribery and the Hobbs Act as racketeering offenses—seems in conflict with such a construction.

In his motion for reconsideration, the defendant respectfully criticizes the court for failure to address in its earlier opinion one of defendant's most forecful arguments, the argument dealing with the forfeiture provisions of § 1963. But the fact that § 1963 contains certain criminal forfeiture provisions which do not apply to public funds and property does not mean, as defendant argues, that § 1962(c) exempts from criminal liability persons who use public rather than private agencies to conduct proscribed

activities. The fact that a wrongdoer personally uses a legitimate business for illegal ends, whether the business is General Motors or Local Widgets, does not mean that a federal judge can impose a general forfeiture of the assets of that business anymore than he can forfeit the assets of the state. The forfeiture provisions should not be read so broadly. They should apply only to the specific "dirty" money or assets obtained, converted or invested. That would not include legitimate assets of a governmental or a private enterprise. Therefore, the forfeiture provisions of § 1963 are not inconsistent with the construction the court has given the statute.

Accordingly, the motion for reconsideration of the "enterprise" question is granted but for the reasons stated herein and in its earlier opinion, the Court adheres to the view that "enterprise" includes governmental agencies.

ENTER:

/s/ Gilbert S. Merritt
Gilbert S. Merritt
United States Circuit Judge
sitting by designation

[2] TUESDAY MORNING SESSION

September 4, 1979

Thereupon, the following proceedings were had out of the presence and hearing of the jury:

THE CLERK: No. 79-30054-NA-CR, United States of America versus Thomas Edward Sisk, et al., Your Honor.

THE COURT: All right. Let the record reflect that each of the four Defendants are present, and their counsel, and we are ready to proceed.

The Court has read the transcript of the trial. I received, as I think I indicated to counsel, the last installment of the transcript in mid-week last week, and I spent the weekend reading over the remaining portion of the transcript. There is, unexpectedly, at least one problem that I see that we need to discuss this morning, and we have xeroxed—and I'll ask the Clerk to give the Marshal—some copies of a portion of the transcript which concerns me. You just pass that out to each one of them, to counsel.

Just take a minute here, and you may want to read that.

Do you gentlemen want to take a ten-minute recess?

(Recess taken.)

THE COURT: As the Court understands the [3] situation with regard to this interim instruction given by Judge Neese to the jury I think the day before or two days before his heart attack, that situation came about as a result of a ruling on a question of evidence involving the admissibility of co-conspirator, alleged co-conspirator statements.

Under Rule 804 of the Federal Rules of Evidence, the statements made out of Court, out-of-Court declarations which would otherwise be hearsay, made by an alleged co-conspirator, are admissible if found to have been made during the course of and in furtherance of the conspiracy, and this rule of evidence is an exception to the normal hearsay rule.

Now, under Federal Rule of Evidence 104, I believe it is, the question of admissibility; that is, whether there was a conspiracy involving one or more of the Defendants, that determination has to be made under Rule 104 as a preliminary determination of fact by the Judge, and when the Government offered the co-conspirator statements in evidence, Judge Neese made a preliminary find-

ing based upon the evidence in the case and I think other proffered evidence in the case that by a preponderance of the evidence under a case from our Circuit called the Enright case, the necessary finding of a co-conspiracy was made. Now, that ruling was made, as I understand it, outside the presence [4] of the jury.

The next event in this sequence of events which occurred was that there was a newspaper headline that day or the next day shortly thereafter which headlined that finding by the Court, and then, thereafter, counsel for the Defendants were concerned that some members of the jury may have seen that headline on their way back from lunch and have reached the conclusion that the Judge had an opinion concerning the case, the guilt or innocence of the Defendants, and therefore, made a motion for a mistrial.

Now, as it turns out in voir diring the jury, I am doubtful that the jury, in fact, saw the headlines, at least, if they saw it, it apparently did not make much impression on them. But there was no way, I suppose, for Judge Neese to know whether they had or not, and it was difficult to make a determination of that without telling the jury some information that he was hesitant to talk about. I think it was in response to that situation, at any rate, that this instruction, interim instruction to the jury came about.

The difficulty here, though, with this instruction is that, in trying to straighten that situation out, the language used to the jury—and bear in mind that the Judge was addressing the jury; he was not simply addressing counsel, but he was giving them an interim [5] instruction. He says to the jury, which you've read there, but he says to the jury: "The Court did find preliminarily, . . . because I was of the opinion that it was more likely than not that the witness, Mr. Withers, and that each

of the respective Defendants, Mr. Sisk, Mr. Benson, Mr. Taylor and Mr. Thompson were members of a conspiracy for those purposes when the statements, which otherwise would constitute hearsay, were made, and that those statements were in furtherance of that conspiracy."

Now, that statement to the jury states expressly that in the, quote, opinion, end quote, of the Court, the conspiracy alleged in the indictment was proved at least to the extent of it being more likely than not, and that, therefore, the co-conspirator statements are admissible.

Immediately following that statement to the jury, I believe all of the Defendants objected.

Now, the question in my mind about this is whether it was error,—and I'm sure the Defendants take the position that it was. They took the position at that time—and, two, if it were error, whether there is any way it can be corrected; that is to say, whether the Defendants still insist that it was error and whether the Defendants think there is some way that the situation can be corrected to alleviate the problem. That's the subject on which I'd like to hear from you gentlemen this morning. [6] We'll take it in any order you would like to take it in.

Does the Government want to be heard first?

MR. BROWN: Your Honor, I think, initially, only one or two of the Defendants moved for a mistrial before the instruction Judge Neese gave. It was not unanimously moved by all Defendants. I know Mr. Sisk did and one other Defendant may have, but I do not believe the rest of them did so.

The instruction that Judge Neese did give seemed to be trying to answer a question raised concerning the Defendant by the newspaper, and Judge Neese, both before he made the remark Your Honor quoted and after gave a very distinct and very clear instruction that "must

not suggest to you a finding of the guilt of any Defendant beyond a reasonable doubt." He gave an instruction before he said that, and after he said it he immediately followed it up with, "that has nothing to do with the guilt or innocence of these Defendants, any of them, under this standard of reasonable doubt, which you must employ. . ."

So it seems like under the circumstances of the case, Judge Neese was very careful to tell the jury if they saw something, just as a preliminary, that the Court had nothing to do with the guilt or innocence of the Defendants under the reasonable doubt standard. He was clear both before and after seating the jury to state that to them. [7] My indication is that there's no indication that the jury did not understand it.

The Defendants thereafter objected to that instruction, but I don't remember whether or not they formally moved for a mistrial.

The Government thinks that under the circumstances, the careful way that Judge Neese prefaced that statement, it is not in error. I think frankly that as far as doing anything about it, that Judge Neese's instruction on that should be more than adequate. I'm not sure that any further instruction would necessarily help our part of the matter. It seems to me best to leave it where it is.

THE COURT: Well, Mr. Brown, let me ask you this: If it's a question of law whether the Enright finding has been made by the Court under Rule 104-A, how that's then handled? Should the jury be informed? Now, most of the cases say to the contrary; that the jury should not be informed and that it is error to advise the jury of the Court's finding in that regard.

MR. BROWN: Your Honor, we have a couple of cases we've looked at. I think clearly before the new

rule, the Judge, under the old system, had to inform the jury of this preliminarily because then the jury was required to make a final determination.

THE COURT: The judge really didn't make the [8] finding so much as the jury was informed. Under the old rule, prior to the adoption of the Federal Rules of Evidence, as you suggest, the jury made the determination whether it would consider it or not.

MR. BROWN: The Judge there made—at some time would make a ruling. Of course, I don't think Judge Neese had any intention to give—ask the jury one thing, anything about it at all. It came up because of the question of the Defendants. They insisted they were afraid the jury might have seen a headline, which apparently turns out it may have been—

THE COURT: If the instruction to the jury is deemed to be error; that is, under the cases deemed to be error, then the Government's argument, I take it, would be, even so, it's harmless error?

MR. BROWN: Your Honor, I would be unwilling to concede under the circumstances that it's error. I think it would be error if the Judge said, "I found this conspiracy," and left it as that.

There's a Sixth Circuit case that, in effect, says that—it makes an incomplete instruction—the A-l-l-e-g-r-e-t-t-i, Allegretti case, found at 340 Fed 2d 243. But in this case he was very careful to tell the jury that that was —he was using an entirely different standard. He had no opinion on the ultimate guilt or innocence, and [9] that was an entirely different standard.

I think when you apply the fact that what he said was both before and after, we would take the position that it's not error under those circumstances.

THE COURT: All right. May I hear from the Defendants?

MR. SCHWARTZ: May it please the Court, as far as Mr. Benson is concerned, the state of the record was, just to clarify it for certainty, following the raising of the question by the newspaper headline which was the same afternoon, if my memory serves me correctly, Mr. Branstetter on behalf of the Defendant Sisk made a motion for a mistrial on the prejudicial information at least being available to the jury, and that was joined in by Mr. Shockey on behalf of Mr. Thompson. I on behalf of Mr. Benson and Mr. Dugger on behalf of Mr. Taylor contended that the potential for prejudice was great, but that because of the situation of our respective clients we could not move for a mistrial, and therefore did not. So two Defendants did and two Defendants did not move for mistrial on the basis of the newspaper headline.

Then—and I think that the portion of the record that has that, the Court has furnished us this morning. Then the Judge on his own motion, so to speak, determined to instruct the jury. I don't recall there being [10] any request by anybody to further instruct the jury. The first line of what we have, the Court says: "All right, let the motion be overruled, but the Court will speak to the jury about this.

"Bring the jury back in, please."

So my memory is that no Defendant requested that any instructions be given. They were given, and all Defendants did object to those instructions on the basis that it gives the Court the problem this morning.

Now, the reason that I—

THE COURT: You're correct in the statement that —I don't see here that any Defendant asked for an instruction with respect to the matter. Of course, as you say, two Defendants did ask for a mistrial, but I don't see anybody asking for an instruction.

MR. SCHWARTZ: Page 1519 is the first we have before us, but I don't believe that anybody asked for any instructions.

Now, as far as Benson is concerned, may it please the Court, in order of logical sequence, we did not at that time move for a mistrial for reasons that are stated in the record, probably more clearly by Mr. Dugger. I think we joined in his explanation. We did, of course, feel—whatever we may have felt about the publicity aspect of it, we certainly felt that the instructions given the jury were [11] erroneous and suggested exactly what the Court has expressed concerning that today; that is, that the jury would conclude that the Court had found a fact that at least by a preponderance of the evidence that it was ultimately a fact that the jury must find; that is, that there was a conspiracy as charged in the indictment.

Our position is that it is error. Our position is that we could not move for a mistrial at that time for the reasons stated, and are in the same position today. I don't know if that is what the Court—I don't know if that's the parameters of what the Court wants to hear from us.

THE COURT: I want to hear what your position is. You will not continue to assert that the instruction was error, and I take it you're not asserting that it was harmless?

MR. SCHWARTZ: No, sir. I think it was plain error at the time; I think it's plain error now; and I think regardless of what further instructions come to bear, it would have continued to be characterized in that fashion.

THE COURT: Yet you don't want a mistrial?

MR. SCHWARTZ: I can't afford to ask for one.

THE COURT: All right.

MR. DUGGER: May it please the Court, when the newspaper headline was brought up, the Defendant Taylor [12] specifically told the Court that he did not want a mistrial for financial reasons, and I did think that the Court's instruction to the jury was error and specifically objected to it. The Defendant Taylor today is not asking the Court to declare a mistrial. He is requesting the Court to continue with the trial, and the Defendant Taylor does not want to waive any objections or any errors that might have been made in the first three weeks of trial.

THE COURT: You take essentially the same position that Mr. Schwartz takes?

MR. DUGGER: Yes, Your Honor.

THE COURT: All right. Do all Defendants take essentially the same position as Mr. Schwartz?

Do you want to be heard further on that?

MR. SCHWARTZ: I don't think the proposition is clear. I speak only for Benson.

THE COURT: I understand.

MR. SHOCKEY: May we have just a moment, Your Honor?

THE COURT: Yes.

(Off-the-record discussion.)

MR. BRANSTETTER: May it please the Court, it may be that I could overstate the situation as it now exists. Very frankly, I feel a tremendous burden representing a fellow lawyer with a family, recognized [13] considerably in the community from time to time as performing good deeds as well as those who assert bad deeds, and then, to look at a trial that has lasted for a month that is rather destructive of the gentleman financially and his family, looking at the same time to the terrible costs that are involved in the prosecution by the Government and I believe the admitted thirty to forty FBI agents here a lot of the time, and then looking

at Your Honor's questions to the jury a few days ago when the very distinguished lady on the right end here, I forget her name, you asked her why she—if she wanted to continue to sit or something, and if so, why, and she says, "I think Judge Neese would want me to," now, if one looks at the psychology of that situation and then the psychology of the Judge's statement to the jury, and it was plain—and there was another instance when the same thing occurred, and I do not speak derogatorily of Judge Neese. I hold him in high respect, personally and otherwise. But on more than one occasion, he said to the jury, as far as I'm concerned, "Conspiracy has been established." I personally think, because I was the one that was down there watching, that the jury saw the headline. They couldn't avoid it. They had to close their eyes not to see it.

This leaves us in this position based upon some of these considerations, and they're considerations that, I [14] don't know why, mostly I feel rather deeply about. I personally disapprove highly of this type of prosecution to begin with in a Federal Court. It should be down at the State Court, if anywhere, probably in the general sessions of the Circuit Court.

MR. BROWN: I object. This is totally out of the matter before the Court.

MR. BRANSTETTER: We get carried away, and I concede to that. I'll proceed within the proper bounds.

I do want to get back to the enterprise concept, and then the Court can rule because we can save a lot of time, money and expense. One of these days, the United States Supreme Court is going to be under the enterprise concept, the Congress could be, the Sixth Circuit could be. The whole legislative history's contrary. But, in any event, back to the immediate problem.

We lawyers talk and we get different viewpoints from different lawyers. It's my feeling, based upon some experience in this field and this community, that it is exceptionally difficult to insulate a defendant and put him in a vacuum in a case of this sort or anything close to it having received years and years of publicity to where the minds are not poisoned to the extent that they could never be unpoisoned. I think that the statements by Judge Neese have so impressed this jury that we would have real problems [15] instructing them to the contrary. I don't know with a shift in emphasis but what it might be done. We're in a very—we're at a point at this time to make a decision and say specifically that we think the Court could instruct the jury and remove from their minds those matters that have been impressed upon them. I don't know. I think it was Learned Hand who said that —and I feel somewhat the same way about instructions where prejudice matters have been introduced—it's like throwing a skunk in the jury box and then saying, "Don't smell it." I don't know. I have mixed feelings.

I don't want the trial to be discontinued for many reasons on behalf of Mr. Sisk. His whole life, his whole future, that of his family and to some extent the people with whom he has associated through the years are on the line, and if I make a mistake I would feel very badly about it. So I am not going to say anything but this, if Your Honor please, and I mean to be totally sincere and not evasive. I think the statements are, per se, prejudicial, and I thought so at the time. I just couldn't believe it, frankly. I think, per se, they are prejudicial, plain error, but as to what can be done about it at this point, I don't think it's a case which deals with evidence necessity under Rule 25. I think it's a matter that occurred in the trial. So I don't—I have not had sufficient time [16] to go over it with my client, he being a lawyer,

to be of any assistance to the Court any more than I have attempted to be.

THE COURT: Does the Government want to be heard in response?

Mr. Shockey, did you want to be heard?

MR. BRANSTETTER: May I just add one thing while he's talking, and this is not suggesting. I thought about this, and I'm sure with Your Honor's background and experience, your mind has gone back and forth over these issues because they do reflect on our whole system. I don't know whether that a severance of some of the Defendants at this point in time, as we had moved previously, would be a solution. Some of the—for example, and I'm not speaking for anyone except Mr. Sisk in this matter at all. So far, Mr. Taylor's had no involvement in this trial.

THE COURT: Well, the Court has severed the only Defendant that Judge Neese found was not subject to the Enright Rule.

Yes, Mr. Shockey?

MR. SHOCKEY: May it please the Court, on behalf of my client, Mr. Thompson, we would be in the identical position as Mr. Branstetter has related to the Court as to the Defendant, Mr. Sisk.

THE COURT: All right, Mr. Shockey.

[17] Anything further from the Government?

MR. EWING: Your Honor, of course, in making this determination, we're talking about a determination of whether or not to declare a mistrial, and as discussed previously, Mr. Branstetter, I believe, has moved for a mistrial on about six or seven occasions. I don't know. Your Honor, the first time Your Honor was sitting in this case, stated that you didn't think that you could require any Defendant to withdraw any prior motion for mistrial or any alleged error. Now, of course, we're faced

with this situation. Your Honor has brought our attention this morning to the instruction by Judge Neese.

Also, we've got a situation where we've got some pending other matters that they have claimed to be error. Now, we think that they should state whether or not this, coupled with the other one, is any cumulative reason for error. In other words, any error—

THE COURT: They take the position, as I understand it, Mr. Ewing, that this is error and not harmless, and they may take that position about other things as well, but that they do not want a mistrial at this time, and that the value to the Defendants of continuing the trial of the case, which is a value that the Supreme Court has recognized in cases, double jeopardy cases, is when they weigh it the situation outweighs at present [18] their desire for a mistrial. Now, that's the position they assert. I cannot require them to assert a position other than the one they want to take.

MR. EWING: Your Honor, another thing is, and I —of course, the Criminal Justice Act was passed to prevent people, defendants, from being prejudiced merely because of finances. Let's say a man says, "Well, I didn't appeal my conviction because I didn't have any money to appeal." All right. The Government will provide for this appeal. It will provide a transcript. Now, we have two—at least two Defendants in this case now saying, "We think that there's plain error in this record; however, we don't want a mistrial because of financial reasons." And we don't think that financial reasons ought to be the determining factor. If they've got financial problems, these can be resolved, I submit, and we don't think the decision ought to be a key to around finances where on appeal they could argue, "Well, we thought there was error. We would like a mistrial under normal

circumstances, but we were forced to go ahead because of our finances."

THE COURT: What you're saying is that, I take it, that while—although you don't think that the interim instruction was error and it was that it's harmless, if an appellate Court should differ, I take it you would not want to try the case for four or five more weeks before you find [19] that out?

MR. EWING: That's correct, Your Honor, and, of course, with the severance of Mr. Quillen, it will shorten the case somewhat, but we're still looking at three or four weeks, probably. The case has taken roughly a month. But we're talking about what I would say is not a four-month trial. We're talking about some days where we went to 10:30, days where we went to 3:00. And the Government wants to go ahead with the trial, too. Of course, should there be a conviction, then we've got to go back and look at the record and try to defend the record, and we're not saying anything's error at this point, but on the other hand, we want—we don't want—our position is that we don't want the door left open until the end of the proof and then go back and say, "Well, what happened on July the 5th was an error and we'll now have a mistrial."

THE COURT: Well, the Court agrees with you about that. I think that's the problem that we face in the case. I understand the Defendants' position and the Government's position, and now that the Court has read the transcript of the trial and is in a position to rule on the question of mistrial, under Rule 25 of the Federal Rules of Criminal Procedure—and for the record, I might say that that Rule 25(b) provides the following:

"If, by reason of absence, death, sickness or [20] other disability, the Judge before whom the Defendant has been tried is unable to perform the duties to be performed

by the Court—" excuse me. That's (b). (a) is the one I should have been reading.

"If, by reason of death, sickness or other disability, the Judge before whom a jury trial has commenced is unable to proceed with the trial, any other Judge regularly sitting in or assigned to the Court upon certifying that he has familiarized himself with the record of the trial may proceed with and finish the trial."

So that Rule appears to vest in the Court a discretion, after reviewing, to make a judgment whether the case should be continued or not. Now, the standard by which the Court is to make that judgment is not set out in the Rule, and I have not found cases specifically under this Rule which set out a very clear standard.

Ordinarily, in the absence of an interruption of the trial—of a trial and a new Judge coming in, bringing into effect an application of Rule 25, ordinarily, when the question of mistrial comes up, the question is one that is raised by one of the parties, usually, in a criminal case, usually a defendant. There are cases, however, not where you have a new-Judge situation, but cases where the question has arisen whether a mistrial should be granted over the objection of a defendant, and that would be the situation [21] here if we didn't have Rule 25 and the relationship between the law under which a mistrial was granted over the objection of a defendant, and Rule 25 is unclear. But I tend to believe that I should apply the standard that the cases have announced for the granting of mistrials over the objection of defendants, and that test and standard is one of manifest necessity as announced in the cases; that is, is there a manifest necessity, taking all of the factors into account, in order to ensure a fair trial to grant a mistrial even though the defendants, and in this case, the Government

as well, do not want a mistrial or do not ask that a mistrial be granted.

The manifest necessity test for granting a mistrial over the objection and without the consent of the defendant has a long history in the law. The first case that we found on the subject goes back—was written by Justice Story in 1824, the United States versus Perez, 9 Wheaton 579.

Justice Story says: ". . . the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manfest necessity for the act, where the ends of public justice would otherwise be defeated. . . . The Judge is to exercise a sound discretion on the subject; and it is [22] impossible to define all the circumstances which would render it proper to interfere."

There is a long Opinion on that subject.

The Supreme Court has ruled on the question subsequently in several cases; for example, in Gori versus United States, 367 US 364. Justice Frankfurter writing for a majority found that: "If a Judge grants a mistrial over the objection of the defendants, an abuse of discretion should be found only in," quote, " 'cases in which the defendant would be harassed by successive oppressive prosecutions or in which a Judge exercises his authority to help the prosecution at a trial in which his case is going badly while affording yet another more favorable opportunity to convict the accused.' "

Later cases, United States versus Jorn, for example, 400 US 470, place somewhat greater weight on the, "defendant's valued right to have his trial completed by a particular tribunal."

That is the best I can tell, gentlemen, the law on manifest necessity.

Now, the Court has to apply those rather general standards to the facts of this case and to weigh and consider the factors involved here.

The Court has listened to you gentlemen and has reached the conclusion that a new trial must be granted in [23] this case. The Court hereby declares a mistrial and orders a new trial under Rule 25 and under the manifest necessity test.

The factors which I have weighed in reaching that conclusion and which seem to me to be decisive and determinative in favor of a mistrial are, first, the delay itself. Although that's not a determinative factor, it is a factor. It's an unusual circumstance, and it is a circumstance that could lead, as one or two of the jurors indicated, to forgetting the proof in the case, overlooking and not remembering evidence. Most of the jurors were not concerned about that.

The second factor that the Court has weighed and has found to be significant is the fact that several, I think three, of the jurors on the voir dire said that they had heard from friends or associates at work something about the publicity regarding the Murfreesboro allegation of jury tampering in Murfreesboro; that is, the problem that arose during the case in some anonymous person having called Mr. Sisk on the telephone, and then the ensuing set of events. Two or three jurors who alluded to this didn't appear to know much about it, but they did know something about it, and I suppose that what they knew about it was that an effort had been made to tamper with a member of the jury and to obtain the vote of a member of the jury in [24] exchange for money; that that allegation had been made. Now, the investigation in the case did not show that, in fact, any member of the jury had been contacted, and the evidence in the investigation would indicate to the contrary; that it may have been simply an effort by some individual to profit

at the expense of what he assumed to be the distress of Defendants.

But, at any rate, some members of the jury heard something about that, and the question there would be the psychological effect of that, and if there is any psychological effect, and I'm not certain whether there is, it would be that the jury would be concerned that someone might consider that he or she had been contacted and the subtle psychology would be to clear one's name by voting for conviction. That's the second factor that concerns the Court and is the second factor in my thinking in ordering a mistrial in the case.

And the third factor is the one that we took up this morning that I won't repeat too much about. All of the jurors were given an interim instruction that the Judge had found and was of the opinion that it was more likely than not that the Defendants in the case, or at least four of the Defendants; that is, Defendants other than Quillen, had entered into a conspiratorial agreement as charged in the indictment. And that finding was made, it's true, and the [25] jury was advised that it was made, not on the basis of evidence beyond a reasonable doubt which is the standard that the jury would have to follow, but was made according to a different lesser standard, but the effect of the instruction still was to tell the jury that the Judge had made a preliminary finding and believed in his own mind that the Defendants had engaged in the conspiracy or he was at least sufficiently satisfied to let it in the evidence.

For all of these reasons, the Court is unable to find that it would be proper under Rule 25 of the Federal Rules of Criminal Procedure to continue the trial; and further, that there is a manifest necessity for declaring a mistrial and starting the trial again from the beginning on a clean slate with a new jury.

No. 79-5369

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS EDWARD SISK, CHARLES BENSON, JR., CHARLES FREDERICK "FRED" TAYLOR, and WILLIAM AUBREY THOMPSON,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Tennessee,
Nashville Division.

Decided and Filed September 18, 1980.

Before: LIVELY and MARTIN, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This case comes before us as the last link in an improbable chain of events. Two questions are presented: first, whether there was "manifest necessity" for the district court's *sua sponte* declaration of a mistrial, so that retrial of appellants was not barred by the Double Jeopardy Clause of the Fifth Amendment; second, whether a government entity can be an

"enterprise" within the scope of the "Racketeer Influenced and Corrupt Organizations" ["RICO"] chapter of the Organized Crime Control Act.[1] We hold that the facts of this case demonstrate the "manifest necessity" of the district court's declaration of mistrial; there was therefore no error in the district court's denial of appellants' motion to dismiss the indictment on double jeopardy grounds. We do not reach the second question, for we lack jurisdiction to consider it.

I

Each of the appellants in this case was in some way connected with the government of the State of Tennessee. Appellant Sisk was legal counsel to the governor; appellant Benson was an extradition officer working under Sisk; appellant Taylor, a Tennessee highway patrolman, was part of the governor's security staff, appellant Thompson was a Democratic Party committeeman in Hamilton County, Tennessee. These four were charged with violating, and conspiring to violate, RICO by using their political influence to "sell" commutations of sentences and immunity from extradition.

After a suppression hearing and the usual flurry of motions, appellants' trial commenced on July 19, 1979 before Judge Charles G. Neese. On August 10, having suffered a heart attack, Judge Neese certified that due to his illness he was no longer able to preside at appellants'

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1. Section 1962(c) of the codified Act provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c) (1976).

trial. Pursuant to Rule 25(a), Fed. R. Crim. P.[2] Circuit Judge Gilbert S. Merritt, Jr., was designated to continue the trial, presiding in Judge Neese's stead. On September 4, having questioned each juror to determine whether any juror bias had arisen in the course of the eventful and highly publicized prior proceedings, Judge Merritt explicitly found "manifest necessity" to declare a mistrial. He did so, citing three separate grounds. The first was the four-week break in the trial following Judge Neese's initial illness; Judge Merritt concluded after questioning the jurors that their recall of the evidence presented had diminished. Second was the publicity during the trial break concerning a purported jury-tampering attempt, in which appellant Sisk had allegedly been called by a person offering to secure for him a "friend" on the jury in exchange for $25,000. Third was Judge Merritt's conviction that Judge Neese had erroneously instructed the jury on the existence of a conspiracy among appellants—a preliminary finding which triggered application of the coconspirators' exception to the hearsay rule. These three sources of possible juror prejudice led Judge Merritt to conclude that the parties could not have received a fair trial before that jury; he therefore believed it was necessary to declare a mistrial, and that retrial of appellants consequently would not be barred by the Fifth Amendment.

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2. The Rule provides that:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

II

All of the defendants below objected to the trial court's declaration of mistrial.[3] Thus this ruling, while it precluded all possibility of convictions which might have been upset on appeal, also prevented the appellants from exercising their "valued right to have [their] trial completed by a particular tribunal. . . ." *Wade v. Hunter,* 336 U.S. 684, 689 (1949). *Accord, Illinois v. Somerville,* 410 U.S. 458, 466 (1973); *United States v. Jorn,* 400 U.S. 470, 484 (1971) (plurality opinion of Harlan, J.). This "valued right . . . must in some cases be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter, supra,* 336 U.S. at 689.

We must decide whether in the present case this "valued right" was properly so subordinated. There are no judicial per se rules for striking the balance of these personal and public interests; each case must turn on its facts. *See United States v. Jorn, supra,* 400 U.S. at 480 (opinion of Harlan, J.); *Downum v. United States,* 372 U.S. 734, 737 (1963); *Wade v. Hunter, supra,* 336 U.S. at 691; *United States v. Perez,* 22 U.S. 256, 256 (9 Wheat. 580) (1824). *See also* Holleman, *Mistrial and the Double Jeopardy Clause,* 14 Ga. L. Rev. 45, 78 (1979).

Justice Story described a balance tilted toward the public's interest as one of "manifest necessity" for declaring a mistrial:

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in

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3. Appellant Sisk had moved for a mistrial and had apparently been joined in that motion by appellant Thompson. Sisk withdrew his motion later in the trial. The government, for its part, declared that, while a mistrial might properly be declared, it was ready and willing to proceed before the first jury empaneled.

> their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

Perez, supra, 22 U.S. at 256 (9 Wheat. at 580).

"Manifest necessity" has become a term of art. It is a descriptive phrase which has acquired its own connotations; it cannot be read literally, for rarely will it be "necessary," in any everyday sense, for a trial judge to declare a mistrial. *See Arizona v. Washington,* 434 U.S. 497, 506 (1978). The necessity spoken of reflects a trial judge's estimate of the fairness to both sides of continuing a trial. Normally, courts will accord great deference to this estimate:

> [Trial judges] are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.

Perez, supra, 22 U.S. at 256 (9 Wheat. at 580).

But here, as in all cases, discretion does not equal license; the Fifth Amendment's guarantee against double jeopardy would be a sham if trial judges' declarations of "necessary" mistrials were in fact to go unreviewed.

The Supreme Court has repeatedly tried to develop rules defining the reach of the Double Jeopardy Clause following a declaration of mistrial over a defendant's objection. *Gori v. United States,* 367 U.S. 364, 369 (1961) implies that *sua sponte* declarations of mistrials will not bar subsequent retrials, "where it clearly appears that a mistrial has been granted in the sole interest of the defendant. . . ." *But see id.* at 370 (Douglas, J., dissenting).

"Sole interest of the defendant" is a concept that defies definition; in *Arizona v. Washington, supra,* the Court attempted to provide sharper guidelines for the review of mistrial declarations. There is, according to the Court, a "spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny. . . ."[4] *Id.* at 510. At one end of this spectrum are those cases in which the basis for the mistrial is the unavailability of critical prosecution evidence, or in which the state's superior resources are possibly being used to harass a defendant with successive trials. At this end of the spectrum, the "strictest scrutiny" is appropriate when a second prosecution is attempted. *Id.* at 508-09.

The other extreme is the case of the "classic" mistrial —declared when the trial judge believes the jury is unable to agree on a verdict. It is a commonplace in our legal system that a trial judge may discharge a genuinely deadlocked jury and require defendants to stand trial again. Because it is the trial judge who has heard and observed the jurors in such cases, appellate courts should and do normally defer to a trial judge's determination that a jury cannot reach a fair verdict.

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4. The Court added in a footnote an obvious point—that "if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate." 434 U.S. at 510 n. 28. This is not a case of such judicial action.

The present case lies in the latitudes between these poles. This case, like *Washington*,[5] resulted in a mistrial below because the trial judge wished to avoid submitting a case to biased jurors. Ordinarily a trial judge's estimate of juror prejudice is accorded "the highest degree of respect." *Washington, supra,* 434 U.S. at 511. But a mistrial is not "manifestly necessary" simply because the trial judge thinks juror prejudice has arisen; on appeal, the source of that prejudice must also be considered in deciding whether retrial of defendants is permissible under the Fifth Amendment.

When it is a trial judge's uninvited error which gives rise to juror prejudice, the judge may not discharge the jury and subject defendants to a second trial. A contrary rule would enable judges to perfect trial records in an attempt to ensure "irreversible" convictions when they so desired. Such a rule would also allow trial courts total freedom, through the purposeful commission of error, to harass defendants with multiple trials. Therefore Judge Merritt's conviction that his predecessor at appellants' trial had erroneously instructed the jury may not enter into our calculation of the necessity for Judge Merritt's declaration of mistrial.

In *Illinois v. Somerville,* 410 U.S. 458, 464 (1973), the Court, per Justice Rehnquist, stated that "[a] trial judge properly exercises this discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed due to an obvious procedural error in the trial." This language is not in conflict with a rule holding that a judge's own error does not give rise to manifest necessity for a mistrial declared over defendants' objections.

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5. *Washington* dealt with a mistrial declared because of repeated improprieties by defense counsel during opening argument.

The "procedural" error in *Somerville* was a defect in the indictment—a defect which was discovered before any evidence had been presented. The defect was corrected and a new trial begun. The other examples of "obvious procedural errors" given by the Court in *Somerville* were a defendant's failure to make a proper plea[6] and empanelment on the petit jury of a person who had served on the grand jury which had indicted defendant.[7] A trial judge's supposedly improper instruction to the jury on the import of certain evidence is clearly not an "obvious procedural error" in the sense that these are; the errors cited in *Somerville* went to the validity *ab initio* of the first proceedings against the defendants. The errors were procedural in the sense that they destroyed the integrity of the legal process that we call a trial. Judge Neese's supposed error was not of that sort.

As we read it, Rule 25(a), F.R. Crim. P.,[8] permits the continuation under a substitute judge of a criminal trial that had been disrupted by the original judge's disability. It does not authorize the successor judge to sit in appellate review of his predecessor's actions. It is, therefore, irrelevant to appellants' double jeopardy claim that Judge Merritt did not himself commit the error which he pointed to in declaring a mistrial. The error may have been more manifest to Judge Merritt than to his predecessor as presiding judge, but that would not create necessity for a mistrial where no such necessity existed before.

Judge Neese's challenged interim jury instruction may not enter into the determination of the manifest necessity

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6. *Lovato v. New Mexico*, 242 U.S. 199 (1916). The defendant in *Lovato* had demurred to the indictment and his demurrer was overruled. A jury was empaneled before the defendant had ever been arraigned for pleading.

7. *Thompson v. United States*, 155 U.S. 271 (1894).

8. *See* note 2 *supra*.

for a declaration of mistrial below. Judge Merritt listed two other grounds for the declaration: the effect of the four-week delay occasioned by Judge Neese's illness, and the publicity surrounding a purported jury-tampering attempt during that delay. Judge Merritt did not find the delay itself determinative of the necessity of discharging the jury; more significant were the possibly prejudicial reports that reach several members of the jury while they were not under any judge's supervisory authority.

We have already noted that a trial judge's determination concerning potential juror prejudice is given the highest respect by appellate courts. The trial court's examination of the jurors showed that at least four jurors had been asked or teased about the attempt, well reported in the media, of an anonymous caller to provide one of appellants a "friend" on the jury.[9] While each of these jurors expressed confidence in his or her ability to weigh the evidence fairly, Judge Merritt understandably feared that these jurors might be inclined to vote for conviction in order to prove their honesty.

The necessity of discharging the jury is most manifest "when it is made to appear to the court that, . . . by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused." *Simmons v. United States,* 142 U.S. 148, 154 (1891). In the present case, outside influences brought to bear pending resumption of the trial made it appear to the trial court that such prejudice had arisen; under these circumstances, re-

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9. Judge Merritt excused one juror for reasons unrelated to jury tampering publicity; at the time of his mistrial ruling, he was considering excusing at least two others. This would have left only three alternate jurors at a trial that was expected to continue at least three more weeks.

trial of the appellants is not barred by the Double Jeopardy Clause of the Fifth Amendment.

III

Appellants' second contention is that their actions were not within the purview of RICO, and that the trial court consequently erred in denying appellants' motions to dismiss the indictment against them. We have no jurisdiction to consider the propriety of the denial of these pretrial motions.

It is axiomatic that this Court's jurisdiction is defined by statute. *See, e.g., Abney v. United States,* 431 U.S. 651, 656 (1977). The statute applicable here is 28 U.S.C. § 1291 (1976), which grants this Court "jurisdiction of appeals from all *final* decisions of the district courts of the United States . . ." (emphasis added). A pretrial order denying a defendant's motion to dismiss an indictment is not normally an appealable "final decision" under this section. *E.g., United States v. MacDonald,* 435 U.S. 850, 853-54 (1978) (barred pretrial appeal of denial of motion to dismiss indictment on 6th Amendment grounds); *Hoffa v. Gray,* 323 F.2d 178, 179 (6th Cir.), *cert. denied,* 375 U.S. 907 (1963).

The Supreme Court has held, however, that § 1291 does not limit appellate jurisdiction to review of "those final judgments which terminate an action. . . ." *Cohen v. Beneficial Indust. Loan Corp.,* 337 U.S. 541, 545 (1949). Under *Cohen,* an order on a pretrial motion is immediately reviewable if (*inter alia*) the trial court's decision involved rights which would be "lost, probably irreparably [,]" if review were deferred until after trial. *Id.* at 546.

A defendant's right not to be twice put in jeopardy for the same offense would be lost irreparably if the right could only be raised following conviction at a second trial.

Therefore denial of a pretrial motion to dismiss an indictment on double jeopardy grounds is considered "final", and hence immediately reviewable in the Court of Appeals, *Abney, supra,* 431 U.S. at 659.

Appellants argue that their attack on RICO's application is "part and parcel" of their double jeopardy claim and should now be considered by this Court. *Abney* forbids this; this Court does not have ancillary appellate jurisdiction to consider otherwise nonappealable questions which are raised simultaneously with double jeopardy claims. A contrary rule would encourage defendants' assertions of frivolous double jeopardy claims in circumvention of the finality requirement of § 1291. *Abney, supra,* 431 U.S. at 662-63.

The rationale for the final judgment rule—the prevention of piecemeal litigation and attendant delays—is especially cogent in criminal cases. *MacDonald, supra,* 435 U.S. at 854; *Di Bella v. United States,* 369 U.S. 121, 126 (1962). For this reason we do not believe that the district court's denial of appellants' motions to dismiss the indictment for failure to state an offense under RICO could itself be considered appealable under any exception to the final judgment rule. Appellants' motions do raise a purely legal question of statutory construction which is as well within our range of competence as within the district court's. It is therefore tempting to consider this question, for if it is answered as appellants urge, this litigation would be ended. In the long run, however, the right of criminal defendants to be speedily tried would be impaired if we were to adopt the practice of rendering, following interlocutory appeals, what would in effect be advisory opinions on the construction of penal statutes. This is one of those difficult cases in which, to serve the purposes of the final judgment rule, this Court must maintain the rule

even though its individual applications require us to look beyond the plight of individual litigants. *Cf. MacDonald, supra*, 435 U.S. at 850 ("Allowing an exception to the rule against pretrial appeals in criminal cases for speedy trial claims would threaten precisely the values manifested in the Speedy Trial Clause.").

Finally, it is irrelevant to any question of this Court's jurisdiction that both appellants and appellees have requested our interpretation of RICO. The parties to litigation cannot create appellate jurisdiction where none exists. *United States v. Florian*, 312 U.S. 656 (1941) (per curiam), *reversing* 114 F.2d 990, 993 (7th Cir. 1940); *Clark v. Taylor*, 163 F.2d 940, 942-43 (2d Cir. 1947).

IV

The district court's denial of appellants' motions to dismiss the indictment on double jeopardy grounds is affirmed. Lacking jurisdiction to consider it, we express no opinion on the district court's refusal to dismiss the indictment for failure to state an offense under RICO.

No costs are taxed. Each party shall bear its own costs on appeal.

No. 79-5369

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

THOMAS EDWARD SISK, CHARLES BENSON, JR.,
CHARLES FREDERICK "FRED" TAYLOR, and
WILLIAM AUBREY THOMPSON
Defendants-Appellants

ORDER

(Filed October 7, 1980)

Before: LIVELY and MARTIN, Circuit Judges, and PECK, Senior Circuit Judge.

Upon consideration of the petitions for rehearing filed herein by attorneys for defendants-appellants, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petitions for rehearing be and they hereby are denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
John P. Hehman, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 79-5369

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS EDWARD SISK, CHARLES BENSON, JR., CHARLES FREDERICK "FRED" TAYLOR, and WILLIAM AUBREY THOMPSON,
Defendants-Appellants.

Before: LIVELY and MARTIN, Circuit Judges, and PECK, Senior Circuit Judges.

JUDGMENT

(Filed September 18, 1980)

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, denying appellants' motions to dismiss on double jeopardy grounds, and the same is hereby affirmed. Lacking jurisdiction to consider it, we express no opinion on the district court's refusal to dismiss for failure to state an offense under RICO.

No costs taxed. Each party shall bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT.
/s/ John P. Hehman
Clerk

[1455] TRANSCRIPT OF PROCEEDINGS

(August 2, 1979)

BY THE COURT: Is there any preliminary matter to come to the attention of the Court before we return to the case on trial?

Call the case on trial, please.

BY THE CLERK: No. 79-30054-NA-CR, United States of America vs. Thomas Edward Sisk, et al., Your Honor.

BY THE COURT: Is the government ready?

* * *

BY MR. EWING: If Your Honor please, Mr. Grantham was who we had on the stand.

[1456] BY THE COURT: Oh, Mr. Grantham, that's right.

BY MR. COHEN: May I be excused, Your Honor.

BY THE COURT: All right.

BY MR. COHEN: Thank you.

BY THE COURT: Now, ladies and gentlemen, the evidence that you are going to hear from Mr. Grantham relating to statements allegedly made by Mr. Withers is admissible against the defendants, Mr. Sisk, Mr. Benson, Mr. Taylor, Mr. Thompson and Mr. Quillen, but it's not—not Mr. Quillen—Mr. Sisk, Mr. Benson, Mr. Taylor, Mr. Thompson but not Mr. Quillen.

* * *

[1515] BY THE COURT: Excuse me, Mr. Shockey. We have got to break at this time anyway.

The witness is temporarily excused.

Now, ladies and gentlemen, if you will put your earphones down there somewhere, and during our period of recess, don't listen to, read or watch anything in the

public media about the case. Obey all of the instructions the Court has given you.

If you can have your lunch and be back by 12:30, please do so. If it takes you longer than that, take as long as necessary and then come back as soon as you can.

We will be in recess until 12:30.

(THEREUPON COURT RECESSED AND RECONVENED OUT OF THE PRESENCE OF THE JURY)

BY THE COURT: Mr. Branstetter, are all of the defendants present in the courtroom?

BY MR. BRANSTETTER: Yes, sir, Your Honor.

[1516] BY THE COURT: Do you have a matter?

BY MR. BRANSTETTER: Yes, I do, if Your Honor please. I had occasion to walk downstairs at the entrance to the Federal Building here in Nashville at lunch, and in front of the Federal Building on benches sat at least seven or eight of the jurors, and within twelve feet of where some of them were sitting was the Nashville Banner Newspaper with a headline that I could read without my glasses twenty feet away, which reads, "Neese rules four out of five formed conspiracy."

Now, I know that Your Honor has done everything that, at least in my opinion, that could have been done to try to assure that matters are kept from the jury in this situation.

We have asserted a number of motions, and Your Honor has permitted us to continue to file a continuing motion to file matters of this sort, where they appear.

There is no way that jurors entering and leaving this building could avoid, if they—unless they had their eyes closed as they entered, or unless they had their heads turned sharply to the right as they entered and their eyes so focused they could avoid seeing this, and we think it is so prejudicial that there is no way that these defendants can receive a fair and impartial trial, and I move for a mistrial based on this at this time, Your Honor.

BY THE COURT: All right, I do assume that all of [1517] the defendants join in the motion?

BY MR. SHOCKEY: Yes, Your Honor.

BY MR. HARRIS: If the Court please, I'm the fifth man. According to that headline, we are not a party to this conspiracy.

BY THE COURT: So you don't join.

Do I understand that the other defendants do or do not?

BY MR. SCHWARTZ: I do for Mr. Benson, yes, sir.

BY MR. DUGGER: Defendant Taylor does not join in the motion.

BY MR. SCHWARTZ: Strike mine.

BY MR. DUGGER: The reason, if the Court please, is that he can't afford financially to go through another trial after all of this.

BY MR. SCHWARTZ: The same motion for Benson and also....

BY MR. SHOCKEY: May I confer with my client, Your Honor?

BY THE COURT: Yes, sir.

BY THE MARSHAL: (To the audience) Let's put the papers away, please. This court is in session.

BY MR. DUGGER: It's not we don't think the article is prejudicial, it is very prejudicial, I think, but Mr. Taylor can't afford the financial expense of another lengthy [1518] trial.

BY THE COURT: Of course, Mr. Taylor is admitting the acts in the indictment by his plea of entrapment, is he not?

BY MR. DUGGER: He's admitting that he took the money from Baldwin, yes.

BY THE COURT: Well, doesn't your motion run to both counts?

BY MR. DUGGER: Yes, Your Honor.

BY THE COURT: The conspiracy count?

BY MR. DUGGER: Yes, sir, but there are certain acts in the indictment that they have alleged that he doesn't admit.

BY MR. SHOCKEY: Perhaps the Court has heard all it needs to hear on this matter, but if the Court would indulge me for one moment, on behalf of Defendant Thompson, we would strenuously move the Court for a mistrial.

As the Court is well aware and was concerned about the publicity, and now it has become manifestly evident by virtue of what has transpired today that—I, frankly, Judge, don't see how it's possible to get a fair trial with the headlines right in the vicinity of—I know I personally saw four or five jurors in the immediate vicinity, and it was blatantly obvious to anyone in the area as to what these headlines were, and we would beseech the Court for a mistrial on behalf of Mr. Thompson.

[1519] BY THE COURT: All right, let the motion be overruled, but the Court will speak to the jury about this.

Bring the jury back in, please.

BY MR. SHOCKEY: May it please the Court, could we have permission to file this as a separate exhibit, rather than a cumulative exhibit that has been going on?

BY THE COURT: Well, either way you want to do it, yes.

BY MR. SHOCKEY: Thank you.

BY THE COURT: But don't let it be seen.

BY THE MARSHAL: Everyone stand, please.

(THEREUPON THE JURY WAS ASKED TO TAKE THEIR RESPECTIVE SEATS IN THE JURY BOX AND THE PROCEEDINGS CONTINUED)

BY THE COURT: Now, ladies and gentlemen of the jury, on Tuesday, I believe it was, the prosecution offered

the testimony of the witness Mr. Elroy Grantham as to statements that Mr. Grantham said had been made to him by Mr. Ernest C. Withers, and defendants objected to this testimony on the ground that any statements by Mr. Withers constituted inadmissible hearsay.

Ordinarily, someone can't testify as to what someone else said to them unless it was in the presence of the defendant.

The prosecution then announced that the statements were being offered under the provisions of a certain [1520] rule of evidence as statements by Mr. Withers as a co-conspirator of each of the defendants on trial during the course of the furtherance of the conspiracy, and that rule has an exception that a statement is not hearsay if the statement is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

It was necessary then for the Court to determine the preliminary question concerning the admissibility of those statements, and the Court determined this out of your presence and hearing on July the 31st and yesterday under the—as the rules of evidence require.

Now, you must understand that what the Judge found on that question of inadmissibility—of admissibility, rather, in no way relates to your inquiry into the guilt or innocence of each of these defendants, and that my findings were made on the preponderance or the greater weight of the evidence and must not suggest to you a finding of the guilt of any defendant beyond a reasonable doubt, which is the standard under which you will make your determination.

The Court did find preliminarily, as I indicated to you this morning by the preponderance upon the evidence that I considered upon the hearing, all of which you are not acquainted with, because I was of the opinion that it was more likely than not that the witness, Mr. Withers,

and that each of the respective defendants, Mr. Sisk, Mr. [1521] Benson, Mr. Taylor and Mr. Thompson were members of a conspiracy for those purposes when the statements, which otherwise would constitute hearsay, were made, and that those statements were in furtherance of that conspiracy.

Accordingly, I announced to you that those statements could be considered by you against Mr. Sisk, Mr. Benson, Mr. Taylor and Mr. Thompson, but that you could not consider them against the defendant Mr. Quillen.

Now, that's a very important admonition and instruction that I'm giving you, not that the others are not important either, but if you should have it brought to your attention some way that the Judge has already said that there was a conspiracy, that has nothing to do with the guilt or innocence of these defendants, any of them, under this standard of reasonable doubt, which you must employ in this case.

Have you finished with Mrs. Cook?

BY MR. EWING: They were still cross-examining.

BY MR. BRANSTETTER: If Your Honor please, I respectfully except to the instructions.

BY THE COURT: All right.

BY MR. DUGGER: The defendant Taylor also joins in that instruction—exception.

BY THE COURT: All right, anybody else?

BY MR. SCHWARTZ: Benson as well.

[1522] BY MR. SHOCKEY: Thompson as well.

BY THE COURT: All right.

* * *

[87] THE COURT: Well, we are through sooner than I had anticipated. The Court is inclined to, without ruling at the present time if the case is continued, to excuse the juror from Murfreesboro for reasons that I think are apparent, but they are that the publicity in the paper

about the Murfreesboro so-called jury-tampering affair mentioned the Murfreesboro juror and this juror is the only juror from Murfreesboro, [88] and although the Court has no question about the situation, there is the possibility that anyone in that situation psychologically could feel that they can only do their duty and overcome any question by leaning a particular way in the case. For that reason, the Court would be inclined to excuse the juror. Now, here are the parties, I know one of the two of the parties that the defendants have made the motion. I will hear any of the other defendants on that subject, or the Government, if anyone wishes to be heard.

Now, on the other juror, which would mean that we would have to get an alternate because that's the next one. The other juror, who is Mrs. Baker, is the lady who was called by several people she thought were Metropolitan Police and then the F. B. I., and the defendants made a motion that she be excused. I believe, and I am not certain of this, I would have to look it up; I believe there is some legal authority, some Supreme Court cases on this question, and that those cases say that if there is any contact by the Government with a juror, that there should be very compelling reasons for retaining the juror. I'll take a look at those cases, and if the parties want to submit anything on that question, I would be very happy to see it.

MR. BRANSTETTER: We would take a look at that, if Your Honor please, for the law on it and in addition, I think the psychological effect of the F. B. I. calling this lady, [89] saying, as she testified here, "now, don't you leave home", you can see, at least I thought I could see, how she was impressed with that power properly stated, and I just feel very strongly that the number of calls that she received and the overwhelming power that she felt that they had in having her sit right there at

home would be such that it would be unfair for her to sit and hear the same, possibly same, not exact same individuals, but certainly those representatives from the Government that have investigated this case and will be testifying at the witness stand. We would urge on the Court to the extent that it is permissible, that she be excused.

THE COURT: Mr. Brown, either you or Mr. Cohen, I don't think Mr. Branstetter's question goes to anybody's integrity here, I think it's just concern—

MR. BROWN: No, I understand that. Your Honor, we will submit a case or two. My recollection of it is that if there is any contact, the Court is under an obligation to make an inquiry, and determine. That's why we filed the agent's 302 giving the extent of the contact. That particular agent, to my knowledge, has had no contact with the case before, is not a witness. Frankly, the thing is most unfortunate. We get a box and somebody listens to it and thinks they hear something and takes some kind of action. The contact seems to be so innocuous, and so far removed from any merits of this case that the Government's position at this [90] point is that there seems to be no reasonable exclusion of the juror. That would get us down to three alternates, and we have got a long way to go, and I would hate like the dickens to come right up to the end and be one short.

THE COURT: All right, now I'll take that under consideration, and the parties can submit anything they have on the cases on that subject. Now, before we adjourn, I'll hear anything else you may have.

MR. BRANSTETTER: May it please the Court, of course at this point in time we have no way of knowing what Your Honor's decision is, of course, with reference to the method of procedure, but I would like to respectfully request the Court at this time to give us—I understand if we continue, we will probably be back on Tuesday,

Monday being a holiday. We have been engaged, with some considerable staff, in researching the legislative history of Title IX, and particularly as it relates to the term "enterprise". Reading through the total Congressional Record in that respect, I have personally read a tremendous amount, including various new articles that were written by Senator McClellen and various comments made by Senator Kennedy and others—Civil Liberties Union approach. We would like the opportunity of possibly some argument on that before we start the trial, if Your Honor would permit it, and we would also try to by tomorrow afternoon have for the Court some form of a brief, quotations, [91] possibly attachments. We'll try to restrict those as much as possible to relate specifically to the enterprise question of the intent of Congress in that respect, as to might be applicable as to state governments, and subdivisions, and such.

THE COURT: Well, if you can file something on that subject by tomorrow, I should probably give the Government some reasonable period of time to respond. What I would contemplate doing is, once I had the Government's response, and I would hope they have some other people they could put on that subject if they think it's necessary, that we could delay argument on that until maybe later on in the next week, and we could take an afternoon and take the subject up. The problem is in scheduling. I don't mind hearing it, but I just would like to hear both sides at the same time. I think I can see your problem.

MR. BRANSTETTER: I would assume that they have much more staff than I have, and would be ready before I could be ready, Your Honor. The significance as I view it is this, that I think that the record will persuade the Court, from what I have read, that "enterprise" does not cover the Governor's office, so I think it might save time, if in fact my assertions are reasonably accurate in

that request. If we could, additionally, I might suggest this, if Your Honor please, we would like to have some—I am sure, as I understand it, where we left off, the Government was going to illegally pick [92] up with tapes; play the tapes of the Memphis aspect of this case. We are, and will excessively object to those tapes on the basis of the motion we filed here on the wire tap statute, and I will anticipate some evidence possibly being required of the Court for the Court to reach a legal determination as to whether or not our position may be right. I would just think that possibly the whole of the first day might be covered if the Government could be ready on the enterprise question and on the suppression question, particularly as in relation to tapes, that we do intend to begin presenting.

THE COURT: Mr. Brown, do you want to be heard on that?

MR. BROWN: Your Honor, we do propose to begin with certain recorded conversations. We'll probably start off with just some recorded conversations, and then go to a lot of video, but the motion to suppress, Mr. Branstetter's getting into the motion to suppress; again, the Government has two problems. One is the hearing, I understand that it has not yet been transcribed.

THE COURT: The motion to suppress, has there been a motion, other than the one that I know about which was filed recently, to suppress the tapes, and so on?

MR. BROWN: There was an earlier motion to suppress based on some search warrants. I am a little concerned, but almost aside from that is it has not been transcribed yet and [93] because to start off some of the first tapes in the conversation with Mr. Weathers, which Judge Neese approved and made a preliminary ruling on, and that preliminary ruling was based in effect on some of the testimony that occurred after that motion to suppress was

considered. I think before Your Honor is going to be able to make a certificate to be able to proceed, I think that transcript has to be there. That is a concern.

THE COURT: We'll get that done, and I see what you mean. If you want to start with the tapes, I would have to, well, I think the court reporter can give me that over the weekend, and I could read it and be in a position to make a ruling on that.

MR. BROWN: Now the other problem, Your Honor, is on the motion suppressed. What we have an objection to, going into the motion suppressed under the wire tapping statute itself. The motion has to be taken up before trial. Judge Neese, of course, denied Mr. Dugger's motion as not timely, and finally the Government submits it's simply not timely at this point to take the matter up, and we are ready to proceed with the tapes, and as far as the motion to suppress goes, it's not timely. The only objection I would think would be appropriate is to the relevancy or something of that nature.

THE COURT: That might very well be true completely if you didn't have this rule twenty-five, new judge situation. [94] I have to certify that the trial can go forward with fairness to the parties, and that may impose an additional burden on the Court, and get me into questions that as the judge continues to preside wouldn't have to look into, but I understand what you are saying, and I will certainly consider that. I plan on spending this Labor Day weekend reading the transcript. I have it all and it runs about two thousand pages, and I have read six or seven hundred pages, but I'll read the rest of it over the weekend, including that transcript, and will come back, and I think the best thing to do, if it appears that the case will go on to continue, we should ask the jury to come in about 10:30 so we can take up any matters at 9:00 Tuesday that remains, but I would contemplate that over the—

well in all eventuality that we ask the jury to come in Tuesday morning at 10:30 and we reconvene at 9:00 Tuesday morning.

MR. BROWN: Let me comment on one matter, Your Honor. At the hearing on the twenty-seventh, Your Honor requested that we file the transcripts of any wiretaps that concerns the other matter. We have here a copy of the whole investigative report prepared by the F. B. I. We submit that to the Court for the Court's inspection. Also, at the last hearing we requested access to the materials Mr. Branstetter filed under seal, and Mr. Branstetter said he had no objection, and I think the question is just the business of how we are going to be furnished those.

[95] THE COURT: Yes, I think those are now in my chambers and I will ask my secretary to zerox copies of which we are talking about, and make them available to you.

MR. BRANSTETTER: I believe I attached enough copies as I recall, Your Honor, of the material that we filed and asked to be placed under seal so that in the event the Court did distribute it, it would then be there.

THE COURT: If you will wait for a couple of hours, I will check it with my secretary and we'll try to get them.

MR. BROWN: We'll check tomorrow; thank you.

THE COURT: Anything else? If not, we will be in recess until Tuesday morning at 9:00.